In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 864

NELS IRWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and a co-defendant, John F. Kerns, were convicted by a jury, in the United States District Court for the Southern District of California, of 16 counts charging mail fraud in violation of 18 U.S.C. 1341. Petitioner was sentenced to three years' imprisonment on nine of the counts, and was given a suspended sentence on the other seven (1 R. 43). The court of appeals affirmed the conviction on October 21, 1964 (Pet App. A; 1 R. 67–77; 338 F. 2d 770). A petition for rehearing was denied on December 29, 1964. The petition for a writ of certiorari was not filed until January 29, 1965, and is therefore out of time under Rule 22–2 of the Rules of this Court. In

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any event, the issues raised by the petition do not merit review by this Court.

1. There is no basis for petitioner's contention that information was twice obtained from him before trial under circumstances which deprived him of his constitutional right to advice of counsel (Pet. 7–8). The first alleged instance occurred almost two years before the return of the indictment herein. A postal inspector had clipped a coupon from an advertisement by petitioner's company, filled it out in his own name, mailed it, and in turn received printed solicitations from the company (6 R. 481). In addition to the other obvious dissimilarities to *Massiah* v. *United States,* 377 U.S. 201, and *Escobedo* v. *Illinois,* 378 U.S. 478, the information here was obtained during the early part of an investigation of a matter not then even identified as an offense. The second alleged instance involved a later interview of petitioner by the same postal inspector. Petitioner's attorney was present (6 R. 474–475). Whether or not the attorney specialized in criminal matters is plainly immaterial.

2. The overruling of two defense objections to allegedly leading questions asked of petitioner's former employee (2 R. 12–14) was a matter within the discretion of the trial court. Also, as noted by the court below (Pet. App. 14), even if the rulings were erroneous there was no prejudice.

3. The trial court gave full and correct instructions concerning the government's burden of proving both the requisite intent on the part of petitioner and the acts of misconduct (8 R. 674, 676, 679–680), and concerning the jury's duty of determining the guilt of

each defendant on each count individually (8 R. 663–665, 691). The court was not required to frame the instructions in the language requested by the defense. Moreover, contrary to petitioner's assertion (Pet. 5), he was afforded an opportunity to object to the charge prior to the time the jury retired, and he stated that he had no objection (8 R. 695).

4. The sufficiency of the evidence to support the jury's verdict was thoroughly reviewed in the opinion of the court below (Pet. App. 2–12). The evidence was clearly sufficient and there is nothing to warrant a further review by this Court.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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